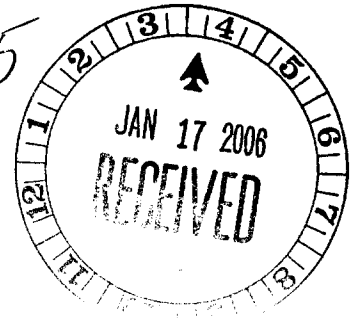


BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.

ORIGINAL

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STB Finance Docket No. 34337

MICHAEL H. MEYER, TRUSTEE IN BANKRUPTCY FOR
CALIFORNIA WESTERN RAILROAD, INC.

v.

NORTH COAST RAILROAD AUTHORITY,
d/b/a NORTHWESTERN PACIFIC RAILROAD

REBUTTAL STATEMENT
OF
MICHAEL H. MEYER, TRUSTEE IN BANKRUPTCY FOR
CALIFORNIA WESTERN RAILROAD, INC.

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MICHAEL H. MEYER, TRUSTEE IN BANKRUPTCY
FOR CALIFORNIA WESTERN RAILROAD, INC.

Due and dated: January 17, 2006

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REBUTTAL STATEMENT
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CALIFORNIA WESTERN RAILROAD, INC.

Michael H. Meyer, Trustee in Bankruptcy for California Western Railroad, Inc.

("Trustee"), pursuant to the Decision of the Board, served November 23, 2005, responds to the Reply Statement of Defendant, North Coast Railroad Authority, served January 13, 2006, as follows:

1. In order to obscure its own culpability, the Defendant, in its Reply Statement, engages in a wholly transparent effort to confuse the pertinent times and involved entities.

2. Defendant, however, cannot – and, indeed, does not – deny the fact that the shut-down of its Willits-to-Shellville Line by the entry of FRA Emergency Order No. 21, on November 25, 1998, was the culmination of Defendant's prolonged neglect of its property. For years preceding the entry of the Order, inspectors of the Federal Railroad Administration ("FRA") and the

California Public Utilities Commission ("CPUC") had cited the Defendant for violations of various of the safety regulations, FRA and CPUC receive repeated assurances from Defendant that remedial actions would be taken, only to have its commitments ignored by the Defendant.

3. At pages 4-6 of its Reply Statement, Defendant incredulously asserts that, when its Willits-to-Shellville line was shut down on November 25, 1998, it found itself without a reasonable request for service, within the meaning of 49 U.S.C. 11101(a). Defendant's contention fails to withstand analysis. The undisputed evidence of record is that California Western Railroad ("CWR") had been tendering to the Defendant an average of 60 carloads a month of lumber shipments originating at the Georgia-Pacific Corporation ("GPC") mill at Fort Bragg, interchanged at Willits and hauled by the Defendant to Shellville to be turned over to the California Northern Railroad and thence the Union Pacific Railroad Company for transportation beyond. The Defendant, at page 5 of its Reply Statement, tends to make light of the testimony of CWR's Chairman, Mr. John Mayfield in his Verified Statement, Attachment C to the Trustee's Opening Statement.¹ Defendant, however, is unable to – and does not – dismiss the testimony of CWR's President, Mr. Gary Milliman in his Verified Statement, Attachment D to the Trustee's Opening Statement, that CWR turned over to Defendant an average of 60 carloads a month of GPC lumber shipments. Even more revealing, Defendant, in its Reply Statement, fails completely to acknowledge the testimony of GPC's General Sales Manager - Western Lumber, Mr. Robert Handegard, Attachment F to the Trustee's Opening Statement. Mr.

¹ Contrary to its representation in its discovery responses, Attachment B to Trustee's Opening Statement, Defendant did not arrange with the Trustee's counsel to have him examine requested documents at the depot in Eureka, counsel's office in Willits or Defendant's headquarters in Ukiah.

Handegard, who at the time of the Defendant's shut-down was the Fort Bragg mill's Sales Manager, stated "I do not have any records of the business we then were doing, but, to the best of my recollection, we then were shipping approximately 700 carloads of lumber a year via the California Western Railroad." Mr. Handegard's recollection that GPC shipped approximately 700 carloads of lumber a year via CWR fully supports the testimony of Messrs. Mayfield and Milliman that CWR turned over an average of 60 carload of GPC lumber a month to the Defendant.

4. Defendant would have the Board believe the ongoing request for service by the Defendant simply disappeared overnight. On November 24, 1998, CWR was interlining GPC shipments of lumber at the rate of 700 carloads or more a year, but on November 26, 1998, there no longer was a reasonable request for Defendant's services. Defendant claims to find support for its implausible contention by asserting, at page 5 of its Reply Statement, that the Trustee introduced no written requests for service. Defendant's observation reveals its unfamiliarity with the way the railroad industry works. When a shipper wants rail service, it picks up the telephone and calls the carrier serving its facility and asks for a certain number of cars to be spotted on the interchange tracks on a specified date and at a specified time. In the meantime, the bills of lading and waybills are prepared by the shipper, and the instruments are given to the originating carrier only when the cars have been loaded and are ready to be pulled. Since after November 25, 1998, when FRA Emergency Order No. 21 was served, no cars could be spotted at the Fort Bragg mill, it is little wonder that there are no documents evidencing the request for Defendant's service.

5. At page 4 of its Reply Statement, Defendant refers to an article in The Press Democrat of August 9, 2002, Attachment A to its Reply Statement, on the closing of GPC's Fort Bragg

mill. According to the reporter, GPC ascribed the closing of the mill to "a global glut of lumber and stiff competition." It bears noting, as well, that the mill's closing occurred more than three and a half years after the Fort Bragg mill had been without railroad service because of Defendant's failure to restore the interchange with CWR at Willits and to resume service on its Willits-to-Shellville Line. The loss of railroad service cannot have failed to contribute to the closing of the Fort Bragg mill.

6. The question before the Board, however, is whether the Defendant failed to fulfill its statutory obligation to render service for which there was an evident need in having done absolutely nothing following the entry of FRA Emergency Order No. 21 to restore the interchange with CWR at Willits and to resume service on its Willits-to-Shellville Line.

7. At page 7 of its Reply Statement, the Defendant, referring to a HNTB/Willdan study, Attachment C to the Reply Statement, contends that it would take \$23 million to restore its property to Class I operating condition. The study, however, was of Defendant's entire line, between Eureka and Shellville, both the Eel River division and the Russian River division, and it was a study completed only a couple of months ago, on November 6, 2005. Trustee, however, seeks to recover damages based only on the Defendant's failure following the entry of FRA Emergency Order No. 21 on November 25, 1998, to restore the interchange at Willits and to resume operations on the Willits-to-Shellville Line. Defendant in its Reply Statement does not dispute that the minutes of Defendant's Board meeting of November 18, 1998, shortly before FRA Emergency Order No. 21 was served, noted that "To comply with FRA, cost would be \$90,000 to \$100,000." See, Attachment G to Trustee's Opening Statement.

8. At page 8 of its Reply Statement, Defendant argues that the expenditure of \$23 million

to restore service on the Willits-to-Shellville Line would have been unreasonable to handle the 60 cars per month which CWR turned over to the Defendant. As already noted, the \$23 million figure was based on a November 6, 2005, study of the cost of restoring Defendant's entire line to Class I operating conditions. On November 18, 1998, the cost of complying with the FRA, the Defendants's Board was advised, was estimated to be \$90,000 to \$100,000. The point to be made however, is that it was not only CWR's 60 cars of GPC lumber shipments which used the Willits-to-Shellville Line. Mr. John A. Darling, President and CEO of Defendant's contract operator, Rail-Ways, Inc., stated that the Willits-to-Shellville Line handled 4,200 carloads annually. See, Attachment H to Trustee's Opening Statement. Defendant in its response to the Trustee's Interrogatory No. 3, said that the traffic on the Line was even greater. "As a matter of summary, the carloads moved from January 1, 1997, through November 30, 1997, were 5,511 carloads . . ." See, Attachment B to Trustee's Opening Statement. Such volume of traffic would have justified the expenditure of sufficient funds to restore service on the Willits-to-Shellville Line, but Defendant elected not use any of its money to do so.

9. Defendant, in its Reply Statement, does not dispute that the minutes of the Defendant's Board of Directors of November 18, 1998, held shortly before FRA Emergency Order No. 21 was served, acknowledged that the Defendant's Board of Directors had \$1 million to disburse. See, Attachment G to Trustee's Opening Statement. Defendant's Board could have authorized the expenditure of all or part of that amount to correct the defects on the Willits-to-Shellville Line which time and again had been brought to the Defendant's attention by the FRA and CPUC inspectors. Defendant, however, elected to use none of that money on the Willits-to-Shellville line and disbursed the funds to unidentified North Coast contractors.

10. Defendant seeks to avoid taking responsibility for either the deterioration of the Willits-to-Shellville Line or for failing to effect the repairs required to restore it to service. At page 3 of its Reply Statement, Defendant claims that in February 1998 it entered into “an operations lease with Northwestern Pacific Railway Company, LLC (“NWPY”).” Defendant, however, cites to no Board decision approving NWPY’s lease of the Defendant’s line, and none can be found on the Board’s web page. Indeed, just a few pages further along in its Reply Statement, at page 9, Defendant acknowledges that NWPY was not authorized by the Board to lease Defendant’s property until three years later.² At page 9 of its Reply Statement, Defendant claims that the lease between the Defendant and NWPY did not terminate until June 30, 2005. Again, Defendant cites to no Board decision authorizing NWPY to discontinue rendering service on the Defendant’s line, and none can be found on the Board’s web page. In fact, the lease between Defendant and NWPY was not consummated, because the funding for the rehabilitation of the properties, which was a condition of the lease, never was forthcoming. Throughout this entire period, between 1998 and 2005, Defendant dealt with an affiliate of NWPY, namely, Rail-Ways, Inc. Rail-Ways, Inc., was nothing more than a contract operator, rendering service in the Defendant’s name. The Defendant remained the common carrier railroad on the line, and it is the entity which was charged by FRA with having failed to comply with the agency’s safety regulations, and it is the entity which violated the statutory obligations administered by this Board and, accordingly, is liable to the Trustee for the damage sustained by CWR.

² See, STB Finance Docket No. 33998, Northwestern Pacific Railway Company, LLC – Lease and Operation Exemption – North Coast Railroad Authority, Northwestern Pacific Railroad Authority and Golden Gate Bridge Highway and Transportation District, served February 6, 2001.

11. At pages 8-9 of its Reply Statement, Defendant contends that the Trustee's claim for damages is time barred. Defendant conveniently ignores section 108(a) of the Bankruptcy Code, 11 U.S.C. 108(a), which extends the statute of limitations two years so as to include any claims which are not time barred as of the date of the filing of the bankruptcy petition so long as the debtor's or trustee's complaint for damages was filed within two years of the date of the filing of the bankruptcy petition. The Trustee's Complaint was filed December 1, 2004, and, therefore, he is may recover whatever damages CWR sustained in the 22 months between December 3, 2000, and September 2002, when GPC closed its Fort Bragg mill.

12. Both Messrs. Mayfield and Milliman in their Verified Statements, Attachments C and D to Trustee's Opening Statement, testified that prior to the entry of FRA Emergency Service Order No. 21 CWR handled on average 60 carloads of GPC lumber shipments, receiving approximately \$500 per carload. Thus, the Defendant's failure to restore the interchange at Willits and to render served on its Willits-to-Shellville line denied CWR some \$660,00 of lost freight revenue. With an operating ratio of approximately 80, CWR sustained a loss \$132,000 of net revenue from freight operations. And that is the amount the Trustee seeks to recover as damages. At pages 9-11 of its Reply Statement, Defendant attempts to make light of the testimony of Messrs. Mayfield and Milliman and criticizes the Trustee for not having presented additional evidence in support of his claim for damages. Defendant does so, however, without offering any evidence of its own and most assuredly none that contradicts the testimony of Messrs. Mayfield and Milliman. In short, the testimony of Messrs Mayfield and Milliman stands unrefuted. A finding by the Board based upon the Messrs. Mayfield and Milliman testimony would complete satisfy the requirement that an agency's findings be supported by substantial

evidence. As the Supreme Court declared in Labor Board v. Columbian Co., 306 U.S. 292, 300 (1939):

Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. "It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," *Consolidated Edison Co. v. National Labor Relations Board*, *supra*, p. 229, and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury [citations omitted].

Accord. Illinois C. R. Co. v. Norfolk & W. R. Co., 385 U.S. 57, 66 (1966); Kay v. F.C.C., 396 F.3d 1184, 1188 (D.C. Cir. 2005).

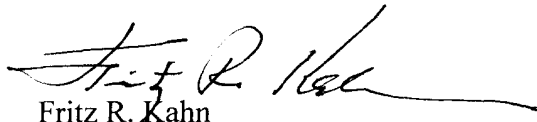
WHEREFORE, Complainant, Michael H. Meyer, Trustee in Bankruptcy for California Western Railroad, Inc., asks that Defendant, North Coast Railroad Authority, d/b/a Northwestern Pacific Railroad, be ordered to pay him damages in the amount of \$132,000.00 for the violations of its statutory obligations as a common carrier railroad between December 3, 2000, and September 2002.

Respectfully submitted,

MICHAEL H. MEYER, TRUSTEE IN BANKRUPTCY
FOR CALIFORNIA WESTERN RAILROAD, INC.

By his attorneys,

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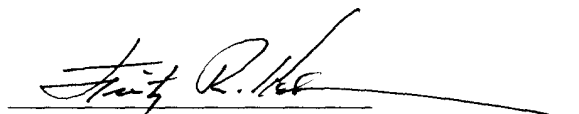
Tel.: (202) 263-4152

Due and dated: January 17, 2006

CERTIFICATE OF SERVICE

I certify that I this day have served a copy of the foregoing Rebuttal Statement upon counsel for North Coast Railroad Authority by facsimile transmitting and by mailing copies thereof by prepaid first-class mail to its counsel, Christopher J. Neary, Esq., and William A. Mullins, Esq.

Dated at Washington, DC, this 17th day of January 2006.


Fritz R. Kahn